Muhsin v Ibrahim & another; Zum Zum Investment Limited (Nominal Respondent) (Petition E001 of 2023) [2024] KEHC 1665 (KLR) (21 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1665 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION E001 OF 2023

DKN MAGARE, J

FEBRUARY 21, 2024

BETWEEN

ABDULKARIM SALEH MUHSIN .... PETITIONER

AND

NEDIM MOHAMED IBRAHIM .... 1ST RESPONDENT

SARA ABDELLA ABDUSAMED .... 2ND RESPONDENT

AND

ZUM ZUM INVESTMENT LIMITED .... NOMINAL RESPONDENT

RULING

1. The application herein is made under Order 2 Rule 15 of the Civil Procedure Rules. It seeks the following orders:-

   a. This Honourable Court be pleased to strike out the petitioner's petition dated 31/5/2015.

   b. The costs of the application be borne by the Defendants.

2. The same is based on the ground that the Petitioner is a majority shareholder of the nominal Respondents and that the petitioner has a power to name any person and appoint auditors on any of the issues.

3. The other reasons given were that that the petitioner was seeking orders against himself. The irony was that in prayer 2 of the application, also seeks an order against themselves. I have no problem allowing prayer 2.

4. The application is supported by the affidavit of Nedim Mohamed Ibrahim. They state that the petitioner is the majority shareholder and in actual control of the company. They state that they have

powers to remove and appoint any person from the board of directors. They annexed a CR – 12 document, showing shareholding as follows:-

a. Sara Abdella Abdusemed 1,500 shares.

b. Abdulkarim Saleh Muhsin 100,050 sharess.

c. Nedin Mohamed Ibrahim 48,450 shares

5. A replying affidavit was filed by the Petitioner, stating that the application is frivolous and an abuse. They stated that the application is not for legitimate reasons. The application is not meant to further the cause of justice but sabotage the hearing of the petition. He states that through he is a majority shareholder, the company adopted one man vote, as seem from Sections 11 – 13, 5, 15 – 38 of the petition.

6. He states that the petition raises more than just legal and simplistic issues.

7. The Respondent filed submissions reiterating the contents of the replying affidavit.

8. The Applicant posited that the petitioners have not filed a replying affidavit. Reliance was placed on the cases of *Daniel Kibet Mutai & 9 Others –vs– Attorney General* (2019) eKLR where they cited *Peter O Nyakumbi & 68 Others -vs- Principal Secretary, state Department, Ministry of Devolution and planning and Another* (2016) eKLR:-

> “(33) Similarly, in the case of *Peter O. Nyakundi & 68 others v Principal Secreary, State Department of Planning, Ministry of Devolution and Planning & another* [2016] eKLR Odero, J addressing a claim where the Attorney General as the respondent failed to file a replying affidavit stated:
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> “As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (see *Mereka & Co. Advocates vs Unesco Co. Ltd* 2015 eKLR, Prof Olaka Onyango & 10 Others vs Hon. Attorney General Constitution Petition No. 8 of 2014 and *Eliud Nyauma Omwoyo & 2 Others –vs Kenyatta University*). The Respondents have failed to refute specifically the allegations in the Petitioner’s sworn affidavit in support. Failure to file a Replying Affidavit can only mean that those facts are admitted. Therefore, in the absence of any evidence to the contrary I find that the petitioners are indeed victims of the 2007/2008 post-election violence.”
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> (34) The position before us is that the appellants averred to certain facts under oath in an affidavit. These facts were not controverted by the respondents either through an affidavit in response or through cross examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted. Secondly, a question arises regarding the weight or probative value

of the averred factual evidence. In other words, are the facts as averred in the affidavits sufficient to prove the appellants' claims?

9. They also relied on the case of *Kennedy Otieno Odiyo & 12 Others vs. Kenya Electricity Generating Company Limited* [2010] eKLR wherein the court held:-

> "The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition address only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus what was deposed to was not entered nor rebutted by the Respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant."

10. They stated that the articles of Association explained were exploited to the prejudice of the Applicant. They relied on the decision of *Zillow Limited & another v Alaska Limited & another* (Petition E012 of 2020) [2021] KEHC 328 (KLR) (Commercial and Tax) (10 December 2021) (Ruling) where Justice Majanja stated:-

> "In *Velani & 6 others v Naran & 2 others* [2021] KEHC 75 (KLR), Mativo J., considered what amounts to oppressive and unfairly prejudicial conduct. As regards oppressive conduct, the learned judge held, and I agree with him, that it is conduct that is burdensome, harsh and wrongful, or which lacks of probity and fair dealing and in reference to the affairs of the company. The learned Judge explained that:
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> [10] Conduct which is "oppressive" or "unfairly prejudicial" must be shown for relief to be granted (although there is no need to show discrimination as well as unfair prejudice). The conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.
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> (11) There are two elements to the requirement of unfair prejudice, and both must be present to succeed in a claim: (a) the conduct must be prejudicial in the sense of causing prejudice or harm to the relevant interest of the members or some part of the members of the company (i.e. shareholders), and, (b) it must be unfair.-----
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> (13) Fairness is judged in the context of a commercial relationship, the contractual terms of which are, in the main, set out in the Articles of Association of the company and in any shareholders agreement. The starting point is therefore to ask whether the conduct of which the shareholder complains is in accordance with the Articles and the powers which the shareholders have entrusted to the board. The best protection for a shareholder is appropriate protection in the articles themselves. Therefore, if the conduct is in accordance with the Articles, to which the shareholder has agreed, it will be more difficult to succeed with an unfair prejudice petition.

11. They prayed that the application dated 12/9/223 be dismissed. I have not seen the Applicant's submissions.

Analysis

12. The application as filed is a waste of judicial time. Both parties agreed that the shareholding structure has the petitioner as a majority shareholder. The petitioner's petition questioned the status quo where the minority shareholding are in control of the board.

13. The Articles require 3 shareholders to decide. However, the Applicants have conceded that the petitioner may appoint the auditor's and other directors. He may be a liberty to do so. However, the question of amendment of the Articles of Association through a court order is an arguable issue. The question of whether the Applicant can through fiat appoint directors alone is an arguable issue.

14. The test for striking out is whether the suit is so hopeless that even if it is not defenced, orders issued will serve no useful purpose. In the case of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR, the court of Appeal, C B Madan JA stated as doth: -

> " Upon appeal:-
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> That is a very strong power, and should only be exercised in cases which are clear and beyond all doubt....the court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments."
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> Per Lindley LJ. ibi, p. 602.
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> "It has been said more than once that rule is only to be acted upon in plain and obvious cases and, in my opinion, the jurisdiction should be exercised with extreme caution."
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> Per Lord Justice Swinfen Eady in *Moore v. Lawson and Another* (*supra*) at p. 419.
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> "It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised. and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved". per Lord Herschell in *Lawrence v. Lord Norreys*, 15. A.C. 210 at p. 219.

15. Section 782 of the *Company's Act* provides as doth: -

> " 782.
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> (1) If, on the hearing of an application to a company under section 780 or 781, the Court finds the grounds on which the application is made to be substantiated, it may make such orders in respect of the company as it considers appropriate for giving relief in respect of the matters complained of.
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> (2) In making such an order, the Court may do all or any of the following:
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> (a) regulate the conduct of the affairs of the company in the future;
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> (b) require the company- (i) to refrain from doing or continuing an act complained of; or (ii) to do an act

that the applicant has complained it has omitted to do;

(c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the Court directs;

(d) require the company not to make any, or any specified, alterations in its articles without the leave of the Court;

(e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.

(3) Subsection (2) does not limit the general effect of subsection (1).

(4) The company is entitled to be served with a copy of the application and to appear and be heard as respondent at the hearing of the application.

16. Consequently, I find the application lacking merit. I dismiss the same with costs of 25,000/= to the petitioner/Respondent.

17. To be able to move forward, in view of the split in the board of the nominal respondent, there shall be an order freezing the dealings on all assets of the company dealing with the pending determination on the petition.

18. The court shall endeavour to deliver its Judgment on 18/4/2024.

Determination

19. The upshot of the foregoing I make the following orders: -

    a. The application dated 12/9/2023 lacks merit and is consequently dismissed with costs of 25,000/= to the petitioner.

20. There be a restraining dealings on the assets of the nominal Respondents by all the parties herein pending the hearing of the petition.

21. The matter shall proceed by way of submissions as earlier ordered.

22. The court shall endeavour to deliver its Judgment on 18/4/2024.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 21ST DAY OF FEBRUARY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Muchoki for the Petitioner

Miss Wangui Njoroge for the Respondent

Court Assistant - Brian